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No. 93-45

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NATIONAL INTERFAITH CABLE COALITION, INC.
Operating as the
VISION INTERFAITH SATELLITE NETWORK, *et al.*,
Appellants,

vs.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from a Three Judge Court of the United States District Court for the District of Columbia

JOINT MOTION TO AFFIRM

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QUESTIONS PRESENTED

Congress adopted the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act" or "Act") to promote growth and diversity in cable television services, to provide for protection of cable television consumers in the absence of effective competition, and to address and cure problems presented by undue market power of cable systems. Sections 4 and 5 of the Act require cable systems to carry the signals of licensed broadcast television stations. Appellants National Interfaith Cable Coalition, Inc. and Atlanta Interfaith Broadcasting challenged §§ 4 and 5 of the Cable Act facially, alleging that the "must carry" provisions violate both Religion Clauses. In the view of the Appellees, the following questions are presented:

1. Is consideration of the Establishment Clause challenge to the Cable Act appropriate in this case, in which the decision below rests on the well-settled precedents of this Court regarding facial challenges asserting violations of the Establishment Clause?

2. Was not the district court correct in its holding that §§ 4 and 5 of the Cable Act do not violate the Establishment Clause, when those sections are scrutinized in accordance with the three-part test established in *Lemon v. Kurtzman,* 403 U.S. 602 (1971)?

3. Was not the district court correct in its holding that, because the benefits which §§ 4 and 5 of the Cable Act provide to local broadcasts that carry predominantly religious formats are merely incidental to the broad impact of the Cable Act, the Act does not violate the Establishment Clause?

4. Is consideration of the Free Exercise of Religion Clause challenge to the Cable Act appropriate in this case, in which the district court relied on the well-settled precedents of this Court regarding facial challenges asserting violations of the Free Exercise of Religion Clause?

5. Was not the district court correct in its holding that §§ 4 and 5 of the Cable Act are neutral laws of general applicability which do not violate the Free Exercise Clause?

LIST OF ADDITIONAL PARTIES TO THE PROCEEDING BELOW

The Appellants' list of parties to the proceeding, *see* Joint Jurisdictional Statement at iii, erroneously omitted from the list of Defendants-Appellees, the following parties, who jointly file this motion to affirm:

Trinity Christian Center of Santa Ana, Inc., doing business as Trinity Broadcasting Network;

Tri-State Christian TV, Inc.;

National Minority TV, Inc.; and,

All American TV, Inc.*

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* In the district court, these Appellees were referred to collectively as "Specialty Broadcasters." Hereinafter, the Appellees filing this Motion To Affirm are referred to collectively as "Broadcasters."

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IN THE

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OCTOBER TERM, 1993

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JOINT MOTION TO AFFIRM

MOTION TO AFFIRM

Appellees hereby move this Court pursuant to Rule 18.6 of the Rules of the Supreme Court to affirm the judgment of the three judge court of the United States District Court for the District of Columbia. As set forth within, the questions, regarding the Religion Clauses of the United States Constitution, upon which the resolution of this matter depend are so well-settled in the precedents of this Court as to require no further development.

STATEMENT OF THE CASE

Fact Summary

Appellee Broadcasters are all nonprofit tax-exempt public charities which operate in the aggregate 22 television stations on commercial frequencies. These broadcasters provide primarily family oriented, inspirational, religious and nonviolent programming. Their religious programming is varied and diversified, includes virtually every Protestant denomination, Catholic and Messianic Jewish programs, as well as public affairs, news, and informational programs. Programming for children sixteen years of age and younger is also provided on a regular and sustaining basis.[1] By order dated April 8, 1993, the district court granted the Motion by these Appellees to intervene as Defendants. *Turner Broadcasting System Inc. v. Federal Communications Commission*, 819 F. Supp. 32, 36 n.1 (D.D.C. 1993), Appendix to Joint Jurisdictional Statement at C-3.[2]

As with the program offerings of the primary commercial networks (ABC, NBC, CBS and FOX), Appellee Broadcasters are subject to considerable market competition. For example, Appellants National Interfaith Cable Coalition, Inc., d/b/a Vision Interfaith Satellite Network ("VISN"), provides a religious and inspirational program service distributed by satellite. VISN was started at the urging of, and has been sustained by loans from, the largest multiple system cable owner and operator in the country, TeleCommunications, Inc. ("TCI"). *Cf.* 819 F. Supp. at 48, J.J.S. App. at C-26-27.

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[1] Trinity Broadcasting Network ("TBN") is the 97th largest public charity in the United States. *See* "The Philanthropy 400," V CHRONICLE OF PHILANTHROPY at 1 (Nov. 1992). The February 1993 Arbitron Company Report listed TBN as the most viewed religious network in the country.

[2] Hereinafter the Appendix to the Joint Jurisdictional Statement, filed by VISN and AIB, is referred to as: "J.J.S. App."

Prior to enactment of the Cable Act, cable systems had an incentive to exclude local television stations because they competed with those television stations for advertisers, programming and viewers. P.L. 102-385 § 2(a)(16) ("There is an economic incentive for cable systems to terminate the retrainsmission of the broadcast signal"). The Cable Act was enacted by Congress to correct that market imbalance, and to promote the widest possible diversity of views and information to viewers. P.L. 102-385 §§ 2(a)(6), (14), (15) & (16).

Among Congress' purposes in adopting the Cable Act was the goal of insuring continued access for subscribers to their local television stations. P.L. 102-385 § 2(a)(16). Local television stations provide unique local programming, much of which is required by the rules and regulations of the Federal Communications Commission to be responsive to ascertained community needs, problems and interests. As Congress found in section 2(a)(9) of the Cable Act, "having cable systems carry the signals of local commercial stations [is necessary and] serves the goals contained in section 307(b) of the Communications Act of 1934 of providing a fair, efficient and equitable distribution of broadcast services."

Through the use of neutral criteria, the Cable Act neutrally provides cable subscribers access to all licensed local full power television stations. As shown by its stated purpose, legislative history, and implementation, the Cable Act was not intended to bestow, and does not function as, a unique and special boon to religious broadcasters, or any other type of broadcaster, by virtue of the content of the programming they may provide.[3] That

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[3] Joint Appellant with VISN, Atlanta Interfaith Broadcasters, Inc., admitted in its February 19, 1993 Reply Memorandum at 7 in the proceeding below (Civil Action No. 92-2247) that neither the Cable Act nor its legislative history make any mention of bestowing any special benefit on any television station because of its program content.

certain cable programmers, such as VISN, have failed to avail themselves of the opportunity to seek and obtain broadcast licenses for local television stations does not mean those provisions abridge the Religion Clauses. Rather, it simply reflects the outcome of private decisions, not a statutory imperative. The Cable Act, as held by the court below, survives constitutional review and should be upheld.

The Decision Below

Unlike others challenging the "must carry" provisions of the Cable Act, VISN and AIB alleged in the district court below that §§ 4 and 5 of the Act violate the Establishment Clause and the Free Exercise of Religion Clause. The district court squarely addressed and rejected the claims asserted by VISN and AIB under the Religion Clauses. *Turner Broadcasting System Inc.*, 819 F. Supp. at 48-49, J.J.S. at C-26-29. In so doing, the district court applied, and correctly relied on, constitutional precedents of this Court.

In essence, VISN and AIB argued below that, since must carry provisions "will reduce the number of cable television channel positions available for use by non-broadcast programmers," such as themselves, the "must carry" rules will result in the exclusion of VISN and AIB from cable systems where they might otherwise be presented. VISN and AIB asserted, "cable operators forced to carry some broadcast religious programming will resist voluntary carriage of additional religious fare" such as VISN and AIB provide. 819 F. Supp. at 48, J.J.S. App. at C-27.

As the district court understood the claims under the Religion Clauses, "[VISN and AIB] argue[] that the must-carry provisions, by granting preferential treatment to local religious broadcasters, create an illicit liaison between the federal government and particular sectarian interests in violation of the Establishment Clause, and by impeding [VISN and AIB] from reaching [their] audience

and delivering [their] religious message, the provisions violate the Free Exercise Clause." *Id.*

Treating the Establishment Clause claim first, the district court invoked the familiar test for alleged violations;

> To comport with the Constitution under the now familiar Establishment Clause test, government action must "(1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion.' '

Id. (quoting *Lee v. Weisman,* 112 S. Ct. 2649, 2654 (1992)) (citing *Lemon v. Kurtzman,* 403 U.S. 602 (1971), and *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S. 756 (1973)). The district court proceeded to analyze VISN's and AIB's Establishment claim in accordance with the *Lemon* Test.

As a preliminary matter, the district noted, and VISN and AIB concede, "[t]here is no evidence that the must-carry provisions were intended to be anything but religion-neutral—as well as content-neutral . . . ." 819 F. Supp. at 48, J.J.S. App. at C-27. Further, the district court found, the "must carry" rules "do not involve the government in religious affairs[nor] will [the rules] be perceived to represent governmental endorsement of particular religious views or religion in general." *Id.*

The district court's application of the *Lemon* Test was straightforward.

First, the court noted that the "must carry" rules "clearly reflect a secular purpose . . . ." *Id.* Regarding evidence of secular purposes of the Cable Act and the "must carry" rules, the court held, "[t]here is nothing in the record to indicate that Congress was even aware of any difference in the religious messages of broadcasters and programmers," and, further, found no evidence "to indicate that must-carry represents a deliberate attempt to favor or disfavor any religious views or practices." *Id.*

Second, the district court found that the "must carry" rules passed the primary effect prong of the *Lemon* Test; that is, that the "must carry" rules had a primary effect that was neither the advancement nor the inhibition of religion. In concluding that there was no impermissible primary effect, the court stated, "[t]he must-carry provisions apply to all broadcasters, without regard to whether their programming contains any religious fare at all." 819 F. Supp. at 49, J.J.S. App. at C-28. Consequently, the district court could not "conclude that the primary effect of the provisions is to advance the religious message of local broadcasters or suppress the religious messages of cable programmers." *Id.*

Third, the district court concluded that the "must carry" rules do not threaten excessive governmental entanglement with religion. "Regulatory legislation creates excessive entanglement," as the district court stated, "only if there is 'detailed monitoring and close administrative contact' between the government and sectarian organizations or affairs." 819 F. Supp. at 49, J.J.S. App. at C-29 (quoting *Hernandez v. C.I.R.*, 490 U.S. 680, 696-97 (1989)). Such "detailed monitoring and close administrative contact" simply is not threatened under the "must carry" rules. The court below reasoned that, because "must carry" eligibility flows from routine satisfaction of a licensing scheme which is free from excessive entanglement, there was "no Establishment Clause infirmity." *Id.* (quoting *Hernandez,* 490 U.S. at 697).

Nor did the district court find merit in VISN's and AIB's Free Exercise Clause claim. In reaching its conclusion regarding the Free Exercise Claim, the district court reasoned, "[a]ny burden imposed on [VISN's and AIB's] religious practice, however, is merely the incidental effect of a facially religion-neutral law that is generally applicable to all operators, programmers, and broadcasters." 819 F. Supp. at 49, J.J.S. App. at C-29. Because the "must carry" rules are neutral and generally applicable,

the district court held that they "do not violate the Free Exercise Clause." *Id.* (citing *Employment Div. v. Smith*, 494 U.S. 872 (1990)). As a factual matter, the court noted, "the must-carry provisions do not, in any way, foreclose dissemination of any religious message or abridge any religious practice." *Turner Broadcasting System, Inc.*, 819 F. Supp. at 49, J.J.S. App. at C-29.

REASONS FOR AFFIRMING THE JUDGMENT BELOW

SUMMARY OF ARGUMENT

This Court should affirm the judgment of the three judge district court below. The questions on which the decision of this cause depends are so plainly settled by the prior decisions of the Court as not to need further development. Just at the end of this Court's last Term, and subsequent to the decision of the district court below, this Court rendered decisions in three Religion Clause cases employing the identical rationales to those found in the decision of the district court. *See Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993) (equal access for religious viewpoints in after hours public school forum does not violate the Establishment Clause); *Zobrest v. Catalina Foothills School District*, 61 U.S.L.W. 4641 (June 18, 1993) (funding for interpreter to assist deaf student in religious school provides, at most, a mere incidental benefit); *Church of the Lukumi Babalu Aye v. City of Hialeah, Florida*, 113 S.Ct. 2217 (1993) (ordinances explicitly adopted to prevent religious sacrifices fail scrutiny under the Free Exercise Clause because the laws were neither neutral nor generally applicable). Because the decision of the district court fully comports with the prior decisions of this Court, summary affirmance is appropriate.

The focus of this case is the facial validity of an act of Congress, the Cable Television Consumer Protection and Competition Act of 1992. Fortuitously, in the debates and considerations leading to the adoption of the Cable

Act, Congress expressly stated its purposes in promulgating the Act, and left an ample record supporting its adoption of the Cable Act.[4] Congress declared the goals of the Act to be: promotion of the availability to the public of a diversity of views and information through cable television and other video distribution media; reliance on the marketplace, to the maximum extent feasible, to achieve that availability; ensuring that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems; where cable television systems are subject to effective competition, ensuring that consumer interests are protected in receipt of cable service; and, ensuring that cable television operators do not have undue market power vis-a-vis video programmers and consumers. P.L. 102-385 § 2(b), 106 Stat. 1463 (Oct. 5, 1992).

Appellants VISN and AIB challenged the "must carry" provisions of the Cable Act, below, as facially unconstitutional violations of the Religion Clauses of the first amendment. The "must carry" provisions (§§ 4 and 5) of the Cable Act compel local cable system operators to carry the broadcast signals of Federal Communications Commission licensees, without reference to the content of the programming broadcast by such licensees. The district court below correctly concluded that the "must carry" rules do not violate the Religion Clauses.

The "must carry" rules have completely secular legislative purposes, neither advance nor inhibit religion, and do not involve an excessive government entanglement with religion. Accordingly, the "must carry" provisions of the Act are fully compatible with the Religion Clauses of the first amendment.

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[4] The findings of fact which prompted the legislation are included within the Cable Act. *See* § 2(a), 106 Stat. 1460-63. The purposes to be served by the legislation are also included within the Act. *See* § 2(b), 106 Stat. 1463.

In their *facial* attack on the Cable Act, VISN and AIB asserted that *implementation* of the Act would impermissibly impact the distribution of their programming and would also impermissibly advance the distribution of religious programming carried on television stations licensed by the Federal Communications Commission.

These Establishment and Free Exercise Clause assertions by Appellants fall flat. The Cable Act is facially neutral, and it is designed to increase the diversity of program offerings available to the cable consumer by including the wide diversity of television stations which are licensed to an area.

In addition, the Cable Act's facial neutrality in the areas of religion and religious broadcasting accords with this Court's interpretation of the Establishment Clause in *Lemon*. Instead of proffering concrete examples of the Cable Act's constitutional invalidity, VISN and AIB have retreated into comparative evaluations of competing broadcasters' program content. *See* Joint Jurisdictional Statement at 11-13. Such content-based determinations are contrary to this Court's holding in *Federal Communications Commission v. WNCN Listeners Guild*, 450 U.S. 582 (1982) (programming formats and content are not part of the licensing procedures).

In the district court, VISN and AIB acknowledged the constitutionality of the Federal Communications Commission licensing of religious organizations which provide religious broadcasting services.[5] The Appellants objected below, as here, only to cable-based, secondary distribution of such religious television service where the "must carry" rules affect access to cable systems. Appellants' approach, however, overlooks the intent of Congress in enacting

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[5] Lower courts have upheld the licensing of groups providing religious programming since 1958. *Noe v. FCC*, 260 F.2d 739 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 924 (1959); *The King's Garden, Inc. v. FCC*, 498 F.2d 51 (D.C. Cir. 1974) (and cases cited therein).

the Cable Act: to increase the cable consumer's access to diverse programming by requiring cable companies to carry local television stations licensed by the Federal Communications Commission, without regard to the program content or the format of any station.

ARGUMENT

I. THE CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992 DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

On occasion, most recently in *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141 (1993), this Court has employed a three-prong test to assess alleged violations of the Establishment Clause. *Harris v. McRae*, 448 U.S. 297 (1980) (explaining *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).[6] As stated in *Harris*:

> It is well settled that a legislative enactment does not contravene the Establishment Clause if it has[: 1] a secular legislative purpose[; 2] if its principal or primary effect neither advances nor inhibits religion [and, 3] if it does not foster an excessive government entanglement with religion.

448 U.S. at 319. *Accord, Bowen v. Kendrick*, 487 U.S. 589, 602 (1988).

In *Lamb's Chapel*, this Court held that affording equal access for expression of religious viewpoints does not violate the Establishment Clause, when analyzed under the framework of the *Lemon* test. *Lamb's Chapel*, 113 S.Ct. at 2148. In this case, the district court merely applied

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[6] This Court has not been slavishly devoted, however, to the *Lemon* Test. In *Zobrest v. Catalina Foothills School District*, 61 U.S.L.W. 4641 (June 18, 1993), this Court addressed a threatened Establishment Clause violation without applying the *Lemon* test.

long-standing constitutional principles derived from the settled precedent of this Court and correctly concluded that the "must carry" rules survive scrutiny under the *Lemon* test. The primary purpose of the Cable Act, promoting consumer protection and industry-wide competition, is secular. Likewise, the primary effect of the Cable Act is secular; the Act neither advances nor inhibits religion. Rather than excessive entanglement, the Cable Act is simply neutral legislation on an important economic issue.

A. The Predominant Purpose Of The Cable Act Is To Encourage Competition And Thereby Benefit The Consumer.

The Cable Act was enacted, as the district court noted, solely to serve secular purposes. *Turner Broadcasting System Inc.*, 819 F. Supp. at 48, J.J.S. App. at C-28. Thus, the Act survives scrutiny under the first prong of the *Lemon* test. *Cf. Harris*, 448 U.S. at 319 (purpose of governmental action must be secular, not religious).

Congress declared its purposes in enacting the Cable Act to be: promotion of programming diversity (utilizing marketplace forces to the extent feasible); ensuring expanded cable capacity and expanded programming; promotion of consumers' interests where effective competition is absent; and, prevention of the exercise of undue market power by cable operators over consumers or video programmers. P.L. 102-385 § 2(b), 106 Stat. 1463 (Oct. 5, 1992). Plainly, these purposes are secular, not "religious" or sectarian.

Moreover, the district court correctly noted that the voluminous legislative history of the Cable Act is devoid of considerations of how to benefit or improve the market position or marketability of religious broadcasters. 819 F. Supp. at 48, J.J.S. App. at C-28. The words "reli-

gion," "religious," and "religious broadcasting" do not even appear in the Act or in the underlying legislative history. Clearly, the impact which VISN and AIB argue that the "must carry" rules of the Cable Act will have on religious broadcasting was not intended by Congress. The envisioned beneficial impact of the Cable Act on religious broadcasters was never conspicuously considered by Congress. The adoption of the Cable Act was not catalyzed by any sort of religious consideration. Accordingly, the Cable Act passes muster under the first prong of *Lemon*.

Not only is the Act devoid of sectarian purpose, it cannot be doubted that such governmental regulation of video programming distribution, to promote economic and free speech goals, serves a secular purpose. Insuring that covered cable systems provide a wide diversity of cable services primarily serves the secular purposes enumerated in the Cable Act. Since *Lemon*'s secular legislative purpose requirement is violated *only* when the governmental activity is *motivated wholly by religious considerations*, the Cable Act satisfies the secular purpose prong of *Lemon*. As this Court held in *Lynch v. Donnelly*, 465 U.S. 668, 680 (1985):

> [We have] invalidated legislation or governmental action on the ground that a secular purpose was lacking, but *only* when it was concluded that there was no question that the statute or activity was motivated *wholly* by religious considerations. Even where the benefits to religion were substantial . . . we saw a secular purpose and no conflict with the Establishment Clause.

465 U.S. at 680 (emphasis added). In *Lynch*, this Court expressed its "reluctance to attribute unconstitutional motives . . . ., particularly when *a plausible secular purpose*" appears on "the face of the statute." *Id.* (emphasis added). For the Cable Act, however, there are not only plausible secular purposes, the secular purposes are the

only benefits to which the Act and its legislative history refer.

Thus, the primary purpose of the Cable Act—providing a competitive diversity of programming—fulfills the *Lemon* requirement of a secular legislative purpose. Any incidental benefit that may flow to religious broadcasters under the Act does not invalidate the Act's plainly secular purpose. This Court must look at Congress' expressed purposes, not a litigant's interpretation of that purpose or at the incidental benefits that may flow from the legislation.

B. The Primary Effect Of The "Must Carry" Rules Of The Cable Act Is To Promote Competitive And Diverse Cable Programming.

The second prong of the *Lemon* Test inquires whether the legislation at issue has the principal or primary effect of advancing or inhibiting religion. *Cf. Harris,* 448 U.S. at 319. As the district court correctly reasoned, "[a] law does not violate the Establishment Clause merely because it benefits or burdens religious institutions in some way." 819 F. Supp. at 49, J.J.S. App. at C-28 (citations omitted). The primary effect of Section 4 of the Cable Act is to improve access to the programming of local broadcast stations for cable consumers. Certainly, the advancement, or the inhibition, of religion is neither a primary nor even a tertiary effect of the Act. The fact that a small number of local stations within that class principally carry religious programming does not alter the results of these considerations.

One reason that the Court may be confident that any asserted advancement of religious broadcasting will be only an incidental effect is that, as noted in Argument I(A), *supra,* neither the Cable Act nor its legislative history mention religious broadcasting. Another reason is that neither Congress nor the Federal Communications Commission know *which* local television stations are

broadcasting predominantly religious programming or, in fact, how many such stations exist. The Federal Communications Commission does not require applicants for construction permits (FCC Form 301) or for licenses (FCC Form 302) to provide information concerning proposed programming formats. This Court has affirmed the policy decision of the Federal Communications Commission to treat changes in entertainment programming as an immaterial consideration. *Federal Communications Commission v. WNCN Listeners Guild*, 450 U.S. 582 (1981). Simply stated, because of the studied ignorance of programming content of its licensed commercial broadcasters, the Federal Communications Commission is incapable of favoring, or disfavoring, one program format over another.

Further, there is, without dispute, a broad spectrum of program formats among the licensed local broadcast stations which will have the benefit of the "must carry" rules. Because of the wide diversity of programming formats, and the predominance of secular content amongst those licensees, there is little or no danger of endorsement or preference. In *Board of Education v. Mergens*, 496 U.S. 226, 252 (1990), this Court upheld a statute addressing equal access rights of high school students against a challenge under the Establishment Clause. There, a plurality of this Court noted, "the broad spectrum of officially recognized student clubs at Westside, and the fact that Westside students are free to initiate and organize additional student clubs, counteract any possible message of official endorsement of or preference for religion or a particular religious belief." *Id.*

A municipality does not impermissibly advance religion by permitting the parish church to connect into the city water and sewage system. Nor does a utility monopoly, operated under close government regulation, impermissibly advance religion by permitting a synagogue to participate in the local telephone service. And in similar fash-

ion, a policy allowing licensed local stations that carry religious formats to have access, on a basis equal to that afforded all other licensed local stations, to cable systems regulated under monopolistic conditions does not impermissibly advance religion.

This Court's decisions regarding analogous governmental activities lend support to the constitutionality of "must carry" rules which incidentally benefit religious broadcasters. Those decisions were summarized in *Lynch v. Donnelly*, 465 U.S. 668, 681-82 (1985):

> [T]o conclude that the *primary effect* of including the creche is to advance religion . . . would require that we view it as more beneficial to and more an endorsement of religion . . . than[:] expenditure of . . . money for textbooks . . . to students attending church-sponsored schools[;] expenditure of public funds for transportation . . . to church-sponsored schools[;] federal grants for college buildings of church-sponsored institutions of higher education[;] noncategorical grants to church-sponsored properties[;] Sunday Closing Laws [previously] upheld; released time program[s] for religious training; and, the legislative prayers [also previously] upheld.

465 U.S. at 681-82 (citations omitted).

Federal legislation providing cable subscribers improved access to local broadcast stations threatens even less directly those secondary effects described in *Lynch*. Indeed, this Court has affirmed other similar policies of equal access. *See Mergens*, 496 U.S. 296 (equal access to secondary school student club forum); *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481 (1986) (equal use of state benefits for religious higher education); *Widmar v. Vincent*, 454 U.S. 263 (1981) (equal access to public university facilities for religious student groups); *Jones v. Wolf*, 443 U.S. 595 (1979) (judicial resolution of church property disputes through neutral principles of adjudication).

An absolute separation between government benefit and religious organizations, under the rubric of separation between church and state, has never been considered by this Court to be required under the Establishment Clause. As noted in *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 746 (1976), "a hermetic separation of the two is an impossibility . . . [that] has never been required." *Cf. Lee v. Weisman*, 120 L.Ed.2d 467, 488 (1992) ("A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution . . . . [A]t graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices and religious persons will have some interaction with the public schools and their students").

Even in the most extreme *imagined* case, all that the Cable Act provides is an *incidental* government benefit to religious broadcasters through a neutral law of general applicability affecting the cable and broadcast television industries. As noted in Argument II, *infra*, such incidental benefits do not violate the Establishment Clause. Thus, the Cable Act simply does not have the primary effect of endorsing religion.

C. No Excessive Entanglement Results From Providing "Must Carry" Access To Broadcasters Providing Religious Programming.

The "must carry" rules of the Cable Act do not foster excessive entanglement of government in religion. According "must carry" status to local broadcast stations with religious programming involves no government entanglement in religion. The "must carry" duty is an index of the status, previously determined, of the local religious broadcaster, as a licensee of the Federal Communications Commission. Thus, the only government act resulting in "must carry" status is the decision to grant a license to a broadcaster who ultimately chooses a religious programming format. The programming decisions which result in

a station carrying a religious format are considered irrelevant for regulatory and legal purposes, *see WNCN Listeners Guild*, 450 U.S. 582. As this Court noted, affirming the Federal Communications Commission's policy on the immateriality of programming content to licensing issues, the Federal Communications Commission treats content as an immaterial consideration. 450 U.S. at 585-86. It is the *deliberate exclusion* of religious broadcasters from among licensed local stations entitled to enjoy the benefits of the "must carry" rules, not their incidental inclusion, that "would risk greater entanglement by attempting to enforce its exclusion of . . . religious speech." *Widmar*, 454 U.S. at 272 n.11.

The monumental task of accomplishing the exclusion of religious broadcasting would require Congress or the Federal Communications Commission to engage in continuous and invasive monitoring of the daily program offerings of its licensees. Furthermore, because most television licensees broadcast some religious programming, unprincipled and unconstitutional determinations would have to be made. For example, quantitatively, how much religious programming is too much? Or, what kinds of speech make a licensee a "religious" broadcaster?

A policy of exclusion would thrust the Federal Communications Commission into a regulatory morass with profound constitutional consequences, but such a policy would not inform regulatory decision-makers of the answers to questions such as whether a program advancing overtly religious principles and precepts (but without proselytization) is religious? Or, whether allowing guests on a talk show to share religious experiences changes the program from a secular designation to a sectarian one. Clearly, the quickest way to entangle Congress and the Federal Communications Commission in a nettlesome thicket of Establishment Clause litigation is to *exclude* religious broadcasters from the class of local broadcast stations to which cable subscribers will have access under

the "must carry" rules. *Cf. Mergens,* 110 L.Ed.2d at 214 (plurality) ("if a state refused to let religious groups use . . . facilities open to others, then it would demonstrate not neutrality but hostility toward religion . . . . The Establishment Clause does not license government to treat religious and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities") (quoting *McDaniel v. Paty,* 435 U.S. 618, 641 (1978)).

Interplay between government and religion under the Cable Act is practically nonexistent. This fact stands in clear distinction to the significant levels of interplay between government and religion in those secular programs already reviewed and upheld by this Court. *See, e.g., Board of Education v. Allen,* 392 U.S. 236, 244-45 (1968) (upholding state textbook loans to religious school students); *Mueller v. Allen,* 463 U.S. 388, 403 (1983) (sustaining state tax deductions and audits for religious school textbooks if secular texts); *Marsh v. Chambers,* 463 U.S. 783, 795 (1983) (affirming constitutionality of the provision of paid chaplain for state legislative assembly). A fortiori, the lesser involvement here, a simple mandate giving cable subscribers improved access to all local stations, including those carrying religious programming, does not create an excessive entanglement problem. Moreover, a "real threat" of excessive entanglement is insufficient; mere imagined possibilities neither violate the constitution nor confer standing.

Nor has this Court previously considered religious institutions as automatically disabled by the Establishment Clause from receiving government benefits. Further, simply being one religious recipient among many secular recipients does not constitute a threat of excessive entanglement. "[R]eligious institutions need not be quarantined from public benefits that are neutrally available to all."

Roemer, 426 U.S. at 746.[7] In fact, this Court has upheld against a facial challenge "a statute that provides . . . benefits" "in a neutral fashion to religious and nonreligious applicants alike," as well as the constitutionality of a specific benefit against an "as applied" challenge based solely on "the religious character of a specific recipient." *Bowen v. Kendrick*, 487 U.S. 589, 551 (1988) (Kennedy, J., concurring).

This Court has said it is "not prepared to read into [a challenged statutory] plan as an inevitability the bad faith upon which any future excessive entanglement would be predicated." *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 660-61 (1980). This Court must presume, absent evidence to the contrary, that the Cable Act will be presumed to function as a neutral platform for program diversity and economic competition, rather than assuming, as do Appellants, that the "must carry" rules will serve presumptively as a platform for religious indoctrination.[8]

II. THE CABLE ACT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE BECAUSE IT REGULATES A BROAD RANGE OF SECULAR CABLE ACTIVITY, WHICH MAY INCIDENTALLY BENEFIT RELIGIOUS BROADCASTERS.

Historically, this Court has not found fault with facially neutral laws that benefit a broad spectrum of secular groups, even though benefits flow incidentally to religious

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[7] *See also Tilton v. Richardson*, 403 U.S. 672, 676 (1971) (providing construction grants to "all colleges and universities regardless of any affiliation with or sponsorship with a religious body"); *Hunt v. McNair*, 413 U.S. 734, 741 (1973) (approving certain benefits "available to all institutions of South Carolina, whether or not having a religious affiliation").

[8] *E.g., Allen*, 392 U.S. at 245 ("this court has long recognized that religious schools pursue two goals, religious instructions and secular education.")

organizations. Accordingly, the proper constitutional focus here is on the class of beneficiaries of the "must carry" rules on the face of the Cable Act. Appellants err in focusing on one particular subclass, religious broadcasters, of a larger class receiving benefits under the Cable Act: commercial broadcast licensees. The court below, however, properly analyzed the benefits, if any, to licensed local broadcasters who carry religious programming, concluded that such benefits are only incidental, and, declared the "must carry" rules constitutional. The eminent reasonability of the lower court's decision flows from its conscious compliance with this Court's decisions regarding "incidental benefits to religion." *See Zobrest v. Catalina Foothills School District*, 61 U.S.L.W. 4641 (June 18, 1993); *Mergens*, 496 U.S. 226; *Bowen*, 487 U.S. 589; *Witters*, 474 U.S. 481; *Mueller*, 463 U.S. 388; *Widmar*, 454 U.S. 264; *Nyquist*, 413 U.S. 756.

In the series of cases running from *Nyquist* to *Zobrest*, this Court has held that programs providing governmental benefits by use of neutral criteria do not violate the Establishment Clause just because religious groups share in the benefits. The only benefits to religion because of the Cable Act are incidental. The Cable Act comports with this Court's jurisprudential considerations and is constitutional.

For example, in *Bowen*, this Court said:

> We note in addition that this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs.

487 U.S. at 609. And, in *Widmar*, 454 U.S. at 274, this Court said:

> But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement of religion."

Again, in *Nyquist*, 413 U.S. at 771, this Court said:

> [N]ot every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religion is, for that reason alone, constitutionally invalid.

An "incidental benefit to religion" occurs when a benefit flows from a neutral government program to a broad array of groups, including religious groups. Such incidental benefits are constitutional. In such instances, religious beneficiaries are only one group among many different recipients, and the qualifying criteria for receiving benefits has nothing to do with religion. Here, the only criterion for receiving the benefit is a neutral one—the recipient must be a licensee of a local television station.

This "incidental benefit" standard reflects this Court's rulings in other recent cases concerning financial aid to religious groups or persons. *See Mueller,* 463 U.S. 388; *Witters,* 474 U.S. 481; *Bowen,* 487 U.S. 589.[9]

In *Mueller,* the first case of that trilogy, this Court held that providing benefits which are available to a wide variety of groups, including religious groups, does not violate the Establishment Clause. This Court pointed to the important analogous legal principle fo equal access from the speech-open forum area of First Amendment law:

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[9] This Court has also upheld laws that gave money to religious organizations when the government gave money to secular organizaitons for the same purposes. *See, e.g., Regan,* 444 U.S. 646 (statutory scheme reimbursing parochial schools for state-required testing and reporting is constitutional); *Wolman v. Walter,* 433 U.S. 229 (1977) (statute that provided secular textbooks, standardized testing, diagnostic services and remedial services to parochial school students is constitutional); *Hunt,* 413 U.S. 734 (revenue bond scheme to fund construction of buildings at a Baptist college is constitutional); *Tilton,* 403 U.S. 672 (federal program that funds construction of nonreligious buildings at religious colleges is constitutional); *Walz v. Tax Commission,* 397 U.S. 664 (1970) (tax exemptions available to all charitable nonprofit groups does not violate the Establishment Clause because religious groups are included in that class).

> Most importantly, the deduction is available for educational expenses incurred by all parents, including those whose children attend public schools, and those whose children attend nonsectarian private schools or sectarian private schools. Just as in *Widmar v. Vincent*, 454 U.S. 263 (1981), where we concluded that the State's provision of a forum neutrally "available to a broad class of non-religious as well as religious speakers" does not "confer any imprimatur of state approval," ibid, so here: "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect." Ibid.

463 U.S. at 397.

The Minnesota tax deduction upheld in *Mueller* gives the model of a constitutional program which incidentally benefits religion, and the Cable Act is analogous to that tax deduction. Minnesota demonstrated a secular purpose for the tax deduction—helping all parents to defray the expenses of educating their children. 463 U.S. at 395. Minnesota granted a state income tax deduction for expenses incurred by parents sending their children to any school, public, private or parochial. *Id.* The tax deduction was not limited to private or parochial schools only. 463 U.S. at 398. The tuition tax deduction was only one among many tax deductions available to Minnesota taxpayers. 463 U.S. at 396.

In this case, the Cable Act provides a benefit to a broad class of recipients—licensed local broadcast stations guaranteed access to cable subscribers served by *inter alia* a monopoly.[10] Here, the *Mueller* principle (that neutral government legislation benefitting a broad range of recipients does not violate the Establishment Clause just because some recipients are religious) affirms the constitutionality of the Cable Act. "Must-carry" rules improve access to private religious broadcasters only because they

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[10] Congress specifically found that the Act was necessary to prevent monopolistic activity by cable systems. *See* P.L. 102-385, §§ 2(a)(9-19).

are a small subclass of a larger class chosen without regard to religious principles or tenets. In disputes such as this one, the benefits program is constitutional because religious groups receive only incidental benefits. This is the clear teaching of *Mueller*.

Upholding the "must carry" provisions is also warranted because only a very small percentage of licensed full power commercial television stations broadcast predominantly religious formats.[11] If some statistically significant portion of "must carry" beneficiaries broadcasted predominantly religious formats, a factual issue regarding a de facto material benefit could, arguably, exist. In the case before this Court, however, the evidence in the record below demonstrates that "must carry" offers only incidental benefits, if any, to religion.

The facts of this case parallel the facts found in *Witters*. In *Witters*, Larry Witters qualified for a Washington state program that provided college aid for blind people who attended college. The state refused to give money to Mr. Witters to attend a Bible college where he wanted to study to be a pastor or youth leader. This Court reversed and ruled that the Establishment Clause did not prevent Larry Witters from receiving funding. This Court found (as in *Mueller*) that the college aid program had a secular purpose of aiding blind people in their educational pursuits, 474 U.S. at 495. Also, religious colleges were only one among many different aid receipients of the program. 474 U.S. at 488.

To illustrate the constitutionality of "incidental benefits" to religion, this Court has explained that not every occasion in which government funds reach religious recipients raises Establishment Clause concerns:

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[11] The Barna Research Group, in a survey conducted in February 1993, concluded that only six and a half (6.5) percent of the licensed commercial television stations in the United States are predominantly programmed with religious material. *See* Affidavit of Robert Higley at Addendum 4a-5a, 7a.

> It is well-settled that the Establishment Clause is not violated every time money previously in the possession of the State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary.

Witters, 474 U.S. at 486-87. To conclude that tertiary or quaternary effects can be accounted as violations of the Establishment Clause requires a mind trained with an eye blinded to the history, the text and the purposes of the Religion Clauses. This Court has noted that such a myopic approach to the issue of incidental benefits to religion would result in invalidation of *all* activities even remotely related to religion, because "[f]ocus exclusively on the *religious component* of *any activity* would inevitably lead to its invalidation under the Establishment Clause." *Lynch*, 465 U.S. at 680 (emphasis added). Logic dictates that the lesser incidental benefit to religious organizations here, equal access together with all other licensed local stations to cable subscribers (as opposed to an actual monetary subsidy), also does not violate the Establishment Clause.

This Court reached essentially the same conclusion regarding actual funding of grantees under the Adolescent Family Life Act, 42 U.S.C. § 300z *et seq.*, (AFLA) in the *Bowen* case. In *Bowen*, the federal government funded programs to discourage teenage sexual activity outside of marirage. Included among the grant recipients were some religious groups. This Court ruled that AFLA was facially constitutional, even though religious groups received some grants. Because AFLA neutrally provided grants to a broad range of groups, the fact that incidental benefits to those religious groups participating in the plan did not lead to the conclusion that AFLA violated the Establishment Clause.

Just last Term, in *Zobrest*, this Court again affirmed the constitutionality of a policy affording "incidental benefits" to a religious school. In *Zobrest*, this Court noted that the Establishment Clause does not bar "religious groups from receiving general governmental benefits." As this Court stated:

> a contrary rule would lead to such absurd results . . . . [Thus,] we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

Id.

Through *Mueller*, *Witters*, *Bowen*, and *Zobrest*, a fundamental principle can be discerned: when the government legislates generally in furtherance of a secular governmental purpose, and neutrally benefits various groups, incidentally inclulding some religious groups, such legislation does not violate the Establishment Clause. Thus, the axiom that "religious institutions need not be quarantined from public benefits that are neutrally available to all," *Roemer*, 426 U.S. at 746, is applicable in the instant case.

The Cable Act neutrally provides cable subscribers access to licensed local broadcast stations. As demonstrated by its stated purposes and legislative history, both of which are utterly silent about religion, the Cable Act was not intended by Congress to be, nor will it ultimately become, a special boon to religious broadcasters.

This Court's holdings in *Mueller*, *Witters*, *Bowen*, and *Zobrest* are all unmistakable and here applicable: if legislation has a secular purpose and provides benefits neutrally available to all who may participate, then it is constitutional, even if it benefits religious groups or individuals. Because the Cable Act is facially neutral and only incidentally benefits religious broadcasters, it does not violate the Establishment Clause.

III. EXCLUDING RELIGIOUS BROADCASTERS FROM A FACIALLY NEUTRAL CLASS RECEIVING A GOVERNMENT BENEFIT WOULD DEMONSTRATE A HOSTILITY TO RELIGION PROHIBITED BY THE FIRST AMENDMENT.

Appellants urged the district court to strike the "must carry" provisions of the Cable Act *because* religious broadcasters may be among those local commercial television broadcasters who gain access to new, previously inaccessible, channels. Appellants argue from a perception of the Religion Clauses that demonstrates an unseemly lack of knowledge of the Religion Clauses and their purposes, and this Court's decisions elucidating both. According to the Appellants, the Establishment Clause compels governments to demonstrate hostility, not neutrality, to religion to avoid violating the Establishment Clause.[12] Under the United States Constitution, however, impermissible hostility toward religious expression is presented in circumstances where all other types of speech are accorded "must carry" status by the Cable Act but religious broadcasters are excluded.

Again, in *Mergens*, 496 U.S. 226, this Court arrived at the same conclusion: the purposeful exclusion of religious

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[12] This hostility requirement flows from a construction of the Establishment Clause which this Court has never adopted. As this Court observed in *Zorach v. Clausen*, 343 U.S. 306 (1952):

> When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. *To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups.* That would be preferring those who believe in no religion over those who do believe.

Id., 343 U.S. at 313-14 (emphasis added). In the instant case, there is not even, as in *Zorach*, a goal of encouraging religious activity. The district court below found that there was "no evidence that the must-carry provisions were intended to be anything but religion—as well as content-neutral . . . ." 819 F. Supp. at 48, J.J.S. App. at C-27.

speech shows hostility to religion and violates the Establishment Clause. Twice in *Mergens* this Court made the point:

> Indeed, the message is one of neutrality rather than endorsement; if a state refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.

Mergens, 496 U.S. at 248.

> Indeed, as the Court noted in *Widmar*, a denial of equal access to religious speech might create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur.

Mergens, 496 U.S. at 253-54 (citations omitted).

Moreover, as noted in Argument I(C), *supra*, a policy of singling out religious speech for exclusion causes excessive government entanglement in religious matters in violation of the Establishment Clause. Under that approach, governments need to monitor closely *all* speech to find the perhaps infrequent, but always prohibited, religious speech. Furthermore, successful exclusion of religious programming requires governmental censors to make value judgments about important constitutional issues (such as what constitutes religious speech).[13] Rather than exhibiting such hostility, "[t]here is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Corporation of Presiding Bishops v. Amos*, 483 U.S. 327, 334 (1987). In the present case, the principle of benevolent neutrality means that cable subscribers should be given access to *all* licensed local television stations regardless of the station's

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[13] Section 326 of the Communications Act of 1934, 47 U.S.C. § 326, prohibits government censorship and states: "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

programming choices. The Establishment Clause requires such an outcome.

Moreover, the Cable Act displays no preference for one religious group over another, or for religion in general. VISN is not excluded from *any benefit* attributed to the Cable Act by virtue of VISN's religious beliefs. VISN is excluded, if at all, only because of its indolence in the matter of licensing. VISN has not sought to acquire a local television station license, which would make it eligible for the benefits of the "must carry" provisions of the Cable Act, nor has it sought to exhibit its programming on local television stations.

IV. NO FREE EXERCISE OF RELIGION ISSUE IS PRESENTED BY THE "MUST CARRY" RULES OF THE CABLE ACT.

The district court correctly concluded, 819 F. Supp. at 49, J.J.S. App. at C-29, that the Cable Act is a neutral law of general applicability and does not violate the Free Exercise Clause.

VISN asserts that the district court erred in its conclusion that the "must carry" provisions comport with VISN's rights under the Free Exercise Clause. When government does not directly target a religious practice for restriction or prohibition, but, instead formulates a neutral law of general applicability, the incidental impact of such restriction or prohibition on a religious practice does not work a cognizable injury to interests protected by the Free Exercise Clause. *Employment Div. v. Smith*, 494 U.S. 872, 879 (190). As this Court in *Smith* stated:

> Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law prescribes (or proscribes) conduct that his religion prescribes (or proscribes).'

Smith, 494 U.S. at 879; *see also Church of the Lukumi Babalu Aye*, 113 S.Ct. 2217.

Here, Congress has not directly targeted a religious practice. Neither commercial television broadcasting nor cable programming are inherently religious in nature. As noted *supra*, Argument I(A), the purposes of Congress in adopting the Cable Act were entirely secular, and the considerations impelling congressional action were also entirely secular. Notably absent from the Cable Act, as well as the underlying legislative history, is any mention of religion.

Plainly, the Cable Act is a neutral law regarding religion. No inquiry is made into religion in the Act, or as a consequence of the Act. Furthermore, the Cable Act is generally applicable. Under the "must carry" provisions, all qualifying cable systems must comply with requirements of the Cable Act. *See* P.L. 102-385 §§ 4 and 5. VISN has not been declared ineligible for any benefits under the Cable Act. VISN is not disqualified from obtaining the license for a local television station, nor is VISN prohibited from seeking to exhibit its programming on licensed local television stations. Any detriment which VISN suffers results from its private decisions concerning program distribution. Those private decisions have no constitutional protection here since VISN is not disqualified in any way from obtaining the benefits VISN claims the Cable Act offers others. Thus, the Cable Act survives a Free Exercise Clause challenge because it is a neutral law of general applicability.

Further, VISN attempts to draw a correlation between this case and *Wooley v. Maynard*, 430 U.S. 705 (1977). This asserted correlation is nonsensical. *Wooley* involved the issue of whether a state may compel one of its citizens to subscribe to a particular ideological belief by promotion of that belief to the exclusion of all others. The "must carry" provisions require only that private cable operators offer their cable subscribers access to a wide variety of local broadcast stations, none of which is singled out for carriage based on the content of its pro-

gramming. VISN's *Wooley* argument boils down to this: the Cable Act's "must carry" provisions allow access to religious broadcasters and, therefore, a compelled association exists. Appellants efforts to pull the *Wooley* decision over the Court's eyes cannot be countenanced. The district court ruled correctly in its dismissal of VISN's Free Exercise Clause claim.

CONCLUSION

The decision of the three judge district court below rests on well-established precedents of this Court and fully comports with the Religion Clauses. Because the questions key to the resolution of Appellants' cause are so plainly settled by this Court's prior decisions as to need no further development, the judgment of the three judge district court should be affirmed summarily.

Respectfully submitted,

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Dated: 4 August, 1993.

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-2247

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Plaintiffs,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Defendants.

Civil Action No. 92-2292

DANIELS CABLEVISION, INC.,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

Civil Action No. 92-2494

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
Plaintiff,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Defendants.

Civil Action No. 92-2495

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

Civil Action No. 92-2558

DISCOVERY COMMUNICATIONS, INC., *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

ORDER

It is, this 1st day of March, 1993,

ORDERED, *nunc pro tunc*, that the Motion for Summary Judgment on Cross-Claim of intervenor-applicant defendant Local Community Broadcasters shall be filed on or before January 22, 1993; and it is

FURTHER ORDERED, that all pending motions for leave to file memoranda in excess of the page limitations established by Local Rule 108(e) (D.D.C.), are granted; and it is,

FURTHER ORDERED, that all pending motions for leave to file out of time are granted.

/s/ Thomas Penfield Jackson
THOMAS PENFIELD JACKSON
U.S. District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-2247 (SFW, TPJ, SS)

TURNER BROADCASTING SYSTEM, INC.,
Plaintiff,

v.

FEDERAL COMMUNICATIONS COMMISSION, and the UNITED STATES OF AMERICA,
Defendants,

TRINITY CHRISTIAN CENTER OF SANTA ANA, INC., d/b/a TRINITY BROADCASTNG NETWORK, ALL AMERICAN TV, INC., TRI-STATE CHRISTIAN TV, INC., NATIONAL MINORITY TV, INC.,
Applicants for Intervention as Defendants.

And Consolidated Actions
Civil Action Nos. 92-2292, 92-2494, 92-2495, 92-2558

AFFIDAVIT OF ROBERT HIGLEY, STATION MANAGER OF WCLJ-TV, BLOOMINGTON, INDIANA

1. I am the station manager of WCLJ-TV, Channel 42, Bloomington, Indiana. WCLJ-TV is licensed by the Federal Communications Commission (FCC) to Trinity Broadcasting of Indiana, Inc., and is a program affiliate of the Trinity Broadcasting Network. I am also in charge of the distribution of TBN's programming by satellite to cable television systems throughout the United States.

2. The programming schedule of TBN, including the feed provided to free over-the-air television stations and to cable television systems throughout the country, is varied and diversified. TBN presents a variety of programs, including religious and inspirational programs, public affairs and informational programs, children's programs and entertainment programs. Among the religious programs offered are a wide variety of Protestant and Evangelical denominations, as well as Catholic, Seventh-Day Adventist, and Messianic Jewish programs. The Protestant denominations which are represented include Baptists, Presbyterians, Lutherans, Assemblies of God, Episcopalian, Methodists, Pentecostal Holiness, and Church of God, among others.

3. WCLJ-TV and TBN comply with the requirements of the FCC in their program offerings. WCLJ-TV has recently been issued a new 5 year renewal of its license by the FCC, authorizing operation into 1997.

4. I am also familiar with the program offering of VISN Interfaith, Inc. VISN provides some, but not all of the denominations offered by TBN. Similarly, TBN has several denominations which are not provided by VISN. I believe both TBN and VISN present a mixed, varied and diversified program offering. Both TBN and VISN are religious organizations.

5. I am also familiar with the Barna Research Group which provided a statement on February 11, 1993, which was included as an attachment to the February 12, 1993 *Memorandum of Points and Authorities of Specialty Broadcasters Supporting the Constitutionality of "Must Carry" Provisions of the Cable Television Consumer Protection and Competition Act of 1992*, in which TBN participated. The Barna Research Group study showed that 6.5 percent of the television stations in America are predominantly programmed with religious material. This study excluded low power television stations since the

circumstances under which such stations will be "must carry" are so scarce they are statistically insignificant. For example, no LPTV station in markets 1 through 160 will ever qualify as a must carry station, and in markets larger than 160 the LPTV station must serve a community that has no full power station within the county. Accordingly, the impact of must carry is really only applicable to full power stations, and of those only 6.5% provide a predominately religious program service—a nominal percentage.

6. The must-carry rules are intended to apply without regard to the program content of free over-the-air television stations. Currently, affiliates of the major broadcast networks, NBC, CBS, ABC and Fox, have also been excluded from carriage by local cable systems. I make this point since the purpose of the Barna Research Group's study, a verified copy of which is attached, was intended only to determine an accurate percentage of free over the air television stations which carry mostly religious programming. In making that determination, the major television networks were excluded since, of my own knowledge, they do not include significant amounts of religious programming. That is not to say, however, that the major television networks are universally carried on all cable systems, since I know they are not. The application of must carry, if it is upheld, applies equally to all broadcast television stations, without regard to program content.

I declare under penalty of perjury the foregoing is true and correct.

Executed February 22, 1993.

By: /s/ Robert D. Higley
ROBERT D. HIGLEY

BARNA RESEARCH GROUP
Limited

February 19, 1993

To Whom It May Concern:

I, George Barna, President and Owner of the Barna Research Group, Ltd., hereby state that the February 11, 1993 letter from Ron Sellers, an employee of Barna Research Group, Ltd., is true and correct to the best of my knowledge and belief. This statement is given on this nineteenth day of February, 1993, by:

/s/ George Barna
GEORGE BARNA

sworn and subscribed to Morgan Schoening, Notary Public this 19th day of February, 1993

/s/ Morgan Schoening
Notary Public, California

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The following figures demonstrate the percentage of commercial broadcast television stations in the United States which carry primarily religious programming.

- Number of commercial TV stations (source: 2/1/93 *Broadcasting* magazine) 1,147
- Number of independent TV stations (source: *1992 TV and Cable Factbook*) 292
- Number of independent stations carrying primarily religious programming (source: 1993 Barna Research Group survey of independent TV stations) 74
- Percentage of all U.S. broadcast television stations which are religious-programming independents 6.5%

Notes:

- Barna Research Group study reached employees of independent TV stations by telephone February, 1993. Of 292 independent stations listed in the *Factbook*, 222 were reached (76%). Programming of unreached stations extrapolated from those which were reached.
- "Independent station" refers to any commercial VHF or UHF broadcast station which is not affiliated with ABC, Fox, CBS, or NBC.
- The Barna Research Group, Ltd. is an independent full-service marketing research firm located in Glendale, CA. Barna Research adheres to recognized survey research techniques, and has considerable experience in research for broadcast and cable clients.
- This report was prepared by project director Ron Sellers, and submitted on the 11th day of February, 1993.

/s/ Ron Sellers
RON SELLERS